UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHANNON O'BRIEN, a single woman,

Plaintiff,

v.

CITY OF TACOMA, a municipal corporation; MICHAEL TORRES, Tacoma Police Department officer; DAVID FISCHER, Tacoma Police Department officer,

Defendants.

Case No. C04-5458FDB

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT RE ESTOPPEL AND § 1983 & NEGLIGENCE CLAIMS

INTRODUCTION

Plaintiff O'Brien brings claims of negligence, false arrest, and violation of 42 U.S.C. § 1983 arising when O'Brien tried to fill a prescription for Percocet, a pain medication, at Walgreen's Pharmacy on July 6, 2002. The pharmacist, Chad Randall, was suspicious of the prescription, called the physician's office (University of Washington Medical Center Neurosurgery Department) and spoke with the physician on call.

Plaintiff's physician was neuro-oncologist, Alexander Spence, M.D., but the pharmacist spoke with Dr. Walker, a resident physician in Dr. Spence's department, who informed the pharmacist that Dr. Spence was unavailable and that he could neither confirm nor deny the validity of

O'Brien's prescription. Dr. Walker advised the pharmacist to inform O'Brien that if she required immediate pain control, she should visit the UW Emergency Room, and the pharmacist made a handwritten note of this advice. The pharmacist at no time talked with Dr. Spence nor did he access Walgreen's database that would have revealed numerous prior occasions when Dr. Spence had prescribed Percocet and other pain relievers for O'Brien.

The pharmacist then called 911 and reported he had a potentially forged prescription stating: "That the doctor said they didn't write [it], and they gave me a little case number and said, you know, if she comes back to get it, call 911." When O'Brien came back the next day, the pharmacist again called the police, Defendants Officers Torres and Fischer responded and arrested O'Brien for prescription forgery.

In January 2003, Plaintiff sued Walgreen's in Pierce County Superior Court alleging, among other things, that Pharmacist Randall's failure to provide accurate and truthful information to the Tacoma police was the proximate cause of her arrest and resulting damages. Walgreen's asserted that some of the damages were caused in whole or in part by, among others, the Tacoma Police Department. Nevertheless, in August 2003, the parties filed a Confirmation of Joinder of Parties, Claims and Defenses with the Superior Court, affirming that there were no additional parties to be named or additional claims to be asserted. (Homan Aff. Ex. 15)

Defendants move for summary judgment asserting estoppel and release and move separately for summary judgment regarding Plaintiff's § 1983 and negligence claims. Defendants have filed briefs in opposition. For the reasons stated below, Defendants' motion must be granted.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477

U.S. 317, 322-323 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630-31 (9th Cir. 1987).

Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

DISCUSSION

Judicial Estoppel

Defendants first argue dismissal based on the doctrine of judicial estoppel because Plaintiff O'Brien had earlier asserted that another party with whom she has settled, Walgreen's, was solely responsible for her arrest and resulting damages, and now O'Brien is attempting to assert that Defendants in this action are liable for her arrest. Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Risetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). The Court explained:

> The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of the judicial proceedings. ... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts. ... Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

Id. at 601. "Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion." *Wagner v. Professional Engineers in California Gov't.,* 354 F.3d 1036 (9th Cir. 2004). The "doctrine of judicial estoppel is not confined to inconsistent positions taken in the same litigation." *Risetto,* 94 F.3d at 605. "... [F]ederal law governs the application of judicial estoppel in federal court. Judicial estoppel enables a court to

protect itself from manipulation." *Id.* at 603. *Risetto* also held that "a favorable settlement constitutes the success required under the so called majority view," that the statement be actually adopted by a court. *Id.* at 605. In *Risetto* the settlement was of a workers' compensation proceeding where the plaintiff succeeded in obtaining disability benefits on her workers' compensation claim.

The situation in this case is similar to that in *Risetto*. Plaintiff expressly pled that her arrest and subsequent damages were caused solely by the actions of the Walgreen's pharmacist; Plaintiff signed a confirmation of Joinder representing that there were no additional parties to be named and no additional claims to be asserted as a result of the incident that was the subject of the lawsuit; Plaintiff stated that her arrest and damages were solely Walgreen's fault and "but for" the pharmacist's "negligence and stupidity" she never would have been arrested. (Homan Decl. Ex. 12, p. 1, ll 21-21; p. 5, ll 5-7.) The assertion that the pharmacist had both lied to the police and had failed to provide the police with complete information and that "but for" this conduct the arrest would never have occurred would have been inconsistent with claims of false arrest and negligence against the officers and would have undermined the claim against Walgreen's. Plaintiff ultimately settled her claims against Walgreen's for $45,000.00.

Plaintiff's argument that the City failed to disclose that it had possessed the prescription slip giving arise to O'Brien's arrest until the officers' depositions, is unavailing, as the City was not a party to the state court lawsuit. Moreover, a copy of the prescription, front and back, was attached to Officer Darland's incident report and logged into evidence. (Homan Decl. Ex. 16.)

The Court concludes that Plaintiff's claims against the City of Tacoma and the police officers should be dismissed pursuant to the doctrine of judicial estoppel.

§ 1983 and Negligence Claims

I

The Defendants City and police officers move for summary judgment on Plaintiff's § 1983

and negligence claims. Defendants argue that (1) the facts and law do not establish a § 1983 violation, as the officers had probable cause to make the arrest; (2) there is insufficient evidence to support a prima facie case of municipal liability under § 1983 against the City of Tacoma; and (3) the negligence claims are barred by the public duty doctrine.

To establish a cause of action under § 1983 a plaintiff must establish: (1) that a person has deprived the plaintiff of a federal constitutional or statutory right and (2) that the person acted under color of state law. 42 U.S.C. § 1983. O'Brien has failed to establish the first element.

O'Brien alleges that she was arrested without probable cause in violation of her Fourth Amendment rights. Probable cause exists if, "at the moment the arrest was made ... the facts and circumstances with [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man into believing" that a crime was being or had been committed. *Brian v. Hunter*, 502 U.S. 224, 228 (1991). Here, the officers had probable cause to believe that the plaintiff was attempting to fill a forged prescription, in violation of Washington's Controlled Substance Act. (RCW 69.50.403 makes it unlawful for any person to knowingly "obtain or attempt to obtain a controlled substance ... (ii) by forgery or alteration of a prescription or written order[.]" The pharmacist was suspicious of the prescription and thought it was possibly forged because it appeared to have been written by two different people, appeared to have been written in two different inks, and was for an unusual number of pills. (Homan Aff., Ex. 1, Request for Admissions No. 6.) The pharmacist called the doctor's office in an attempt to verify it. The pharmacist then called 911 to report the allegedly forged prescription, and when the officer arrived on July 6, 2002, he advised the officer that the doctor's office had said that they had not issued the prescription. The next day when O'Brian returned to get the prescription, the pharmacist, as he was instructed, called 911, and reported to the responding officers, Torres and Fischer, that the doctor's office had said that they had not issued the prescription. Based on this information, the officers made the arrest.

Plaintiff argues that the arresting officers had no other information than that of being dispatched to the Walgreen's regarding a customer who had presented a prescription that was allegedly false. But the information that the officer had collected from the pharmacist the day before was conveyed by Law Enforcement Support Agency (LESA) to the arresting officers the next day after the pharmacist called. A member of the pharmacy staff pointed O'Brien out to the officers. Moreover, "... probable cause may be founded upon hearsay and upon information received from informants ... ," *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 2681 (1978), and police officers may arrest based on information relayed through official police channels. *See United States v. Calhoun*, 542 F.2d 1094, 1100 (9th Cir. 1976), cert. denied, 429 U.S. 1064 (1977). Probable cause can be demonstrated through the collective knowledge of the police officers involved in an investigation, even if some of the information known to other officers is not communicated to the arresting officer. *United States v. Bernard*, 607 F.2d 1257, 1267 (9th Cir. 1979).

Plaintiff also contends that the arresting officers possessed inconsistent or exculpatory information. The arresting officers had the information gathered by the police officer responding to the 911 call the day before. (Fischer Aff., ¶ 3) No arrest was made the day before on July 6, because O'Brien left before the officer arrived. *Id.* Officer Torres spoke with Chad Randall the Walgreen's pharmacist, and the pharmacist told Torres that he had spoken with Dr. Spence and Dr. Spence said that he had not issued the prescription in question. (Withey Decl., Ex. 7, p 10, ll 14-25; 11, ll 1-23.) Officer Fischer spoke with a pharmacy technician, Sophie Cahhy, who told Officer Fischer that "they" had tried to call Dr. Spence, but had been unable to reach him as he was out of town. (Fischer Aff. ¶ ¶ 11 and 12.) Ms. Cahhy also stated to Officer Fisher that "they" spoke with Dr. Spence's partner, Dr. Brown, who said that Dr. Spence had not issued the prescription in question. This information is of the same tenor as that imparted by the pharmacist: that Dr. Spence did not issue the prescription in question. The information that the arresting officers received when they arrived at the Walgreen's pharmacy was consistent with the information that the responding officer

received the day before.

Plaintiff points to the note that the pharmacist wrote on the back of the prescription as being exculpatory; the note states:

Dr. Spence or Walker
206-381-9224
Dr. Said to hold off
If you have severe HA
go to ER
per Dr. Walker

(Homan Aff. Ex. 5 (as contained in Ex. 1 to Darland Dep.) It is undisputed that the arresting officers did not see this note written by the pharmacist. This note does not, however, appear to be exculpatory as it does not contradict anything that the pharmacist told Officers Torres and Fischer. Officers Torres and Fischer had probable cause to arrest Plaintiff under all the circumstances.

II

Defendants argue that they were acting within their discretionary authority and are shielded by a qualified immunity from suit. Qualified immunity shields government officials so long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635 (1987). In determining whether a police officer is properly asserting qualified immunity, a court engages in a two-step analysis:

> A qualified immunity defense must be considered in proper sequence. A ruling should be made early in the proceedings so that the cost and expenses of trial are avoided where the defense is dispositive. Such immunity is an entitlement not to stand trial, not a defense from liability. [citations omitted.] The initial inquiry is whether a constitutional right would have been violated on the facts alleged, for if no right would have been violated, there is no need for further inquiry into immunity. However, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is whether the right was clearly established. This inquiry must be undertaken in light of the case's specific context, not as a broad general proposition. The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.

Saucier v. Katz, 533 U.S. 194 (2001). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Brian v. Hunter*, 502

U.S. 224, 227 (1991).

Plaintiff has not rebutted the presumption of qualified immunity in this case. The arresting officers had probable cause to make the arrest. The officers had reasonably trustworthy information available through LESA and again at the scene when they spoke with the pharmacist and the pharmacy technician that O'Brien was attempting to fill a forged prescription in violation of Washington's Controlled Substance Act. Even if one were to conclude that the officers made a mistake, it was reasonable and they are entitled to dismissal pursuant to the doctrine of qualified immunity.

III

On the issue of municipal liability, the plaintiff must prove: "(1) that the plaintiff possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional rights; and (4) that the policy is the 'moving force behind the constitutional deprivation.'" *Van Ort v. Estate of Stanewich*, 92 F.3d 831 835 (9th Cir. 1996).

The court has concluded that there was probable cause to arrest Plaintiff O'Brien, so Plaintiff cannot meet the first element. Plaintiff merely asserts her conclusion that the City had a policy, pattern, or practice of making exculpatory evidence unavailable to its officers. This assertion does not satisfy the second element. There is no evidence to support a claim of municipal liability against the City of Tacoma under 42 U.S.C. § 1983.

IV

Under the "public duty doctrine," there is no liability for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general(i.e. a duty to all is a duty to no one)." *Torres v. City of Anacortes*, 97 Wn. App. 64, 73, 981 P.2d 891 (1999) *rev. denied* 140 Wn.2d 1007 (2000). There is no cause of action for negligent police investigation. *Dever v. Fowler*,

63 Wash. App. 35, 45, 816 P.2d 1237 (1991), review denied, 118 Wash. 2d 1028, 828 P. 2d 563 (1992). Plaintiff merely responds that the public duty doctrine does not apply because the police officers caused damage to Plaintiff as a result of the negligent performance of their duties. Plaintiff has made no showing that any of the four recognized exceptions to the public duty doctrine apply in this case: (1) legislative intent, (2) failure to enforce when there is actual knowledge of a statutory violation, (3) rescue doctrine: failure to exercise reasonable care when coming to the aid of a particular plaintiff, and (4) where a special relationship exists setting the injured plaintiff off from the general public. Plaintiff's negligence claims, therefore, must be dismissed.

CONCLUSION

There are several grounds for dismissing this cause of action. First, judicial estoppel applies, because Plaintiff O'Brien asserted in her state court case that Walgreen's was solely responsible for her arrest and she signed a Confirmation of Joinder confirming that no additional parties were to be named nor additional claims to be asserted, and she ultimately settled her claim with Walgreen's for a substantial sum. Second, the officers had probable cause to arrest O'Brien because the pharmacist and the pharmacist technician both stated that Dr. Spence had not issued the prescription, and it was reasonable under all the circumstances for the officers to believe these individuals and arrest O'Brien for attempting to obtain a controlled substance by means of a forged prescription. Officers Torres and Fischer, therefore, are entitled to judgment based on qualified immunity. There is no evidence on which to base a prima facie case of municipal liability against the City of Tacoma under Section 1983. Finally, Plaintiff O'Brien's negligence claims against all the parties fail because they are barred by the public duty doctrine and Plaintiff has failed to establish that any of the exceptions to the doctrine apply. Accordingly, Defendants are entitled to judgment on all claims.

NOW, THEREFORE,

IT IS ORDERED:

1. Defendants' Motion for Summary Judgment Re: Estoppel and Release [Dkt. # 18] is GRANTED;
2. Defendants' Motion for Summary Judgment Re: Plaintiff's § 1983 & Negligence Claims [Dkt. # 22] is GRANTED;
3. This cause of action is DISMISSED;
4. The Clerk of the Court shall enter JUDGMENT for Defendants according to this Order.

DATED this 24th day of August, 2005.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE